

NTSB Order No.
EM-52

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 17th day of August 1976.

OWEN W. SILER, Commandant United States Coast Guard

v.

JACKIE LEE WALKER,

Appellant.

Docket ME-49

OPINION AND ORDER

Appellant, Jackie L. Walker, seeks review of the Commandant's decision affirming a 3-month suspension of his license (No. 409987) for negligence while operating the towboat M/V GLENDA S.¹

Appellant had appealed to the Commandant (Appeal No. 2027) from the initial decision of Administrative Law Judge Dee C. Blythe, issued at the conclusion of a full evidentiary hearing.² Throughout the proceedings, appellant has been represented by counsel.

The law judge found that on August 13, 1974, appellant was operating the GLENDA S and tow, upbound on the Lower Mississippi River, under the following conditions and circumstances: The towboat was equipped with properly working radar, which was operating when appellant commenced his watch at 0600; visibility was restricted one-fourth from normal; and the river current was negligible. Appellant turned off the radar at 0610 because it was noisy³ and because, in his opinion, it was not required for the

¹The sanction was entered pursuant to 46 U.S.C. 239(g). This appeal therefrom is authorized by 49 U.S.C. 1903(a)(9)(B).

²Copies of the decisions of the Commandant and law judge are attached.

³In radar terminology, "noise" is a word of art for disturbances appearing on the radar screen. It is apparent from

prevailing visibility conditions. Subsequently, appellant saw a smog bank ahead of the tow. Because the visibility was deteriorating, he reduced engine speed from full ahead to one-third ahead. He also checked river traffic by radio but received no reply; he then turned the radar back on. Several minutes after entering the smog but before the radar had "warmed up," appellant sighted the Borden Chemical Docks 600 feet beyond the tow. He was unable to steer clear or stop before the lead barge of the tow struck the docks. The lead barge severed concrete piers, which were 4 to 5 feet in diameter.

The law judge predicated the sanction on findings that appellant failed (1) To operate the GLENDA S at a moderate speed within the meaning of 33 U.S.C. 341⁴ and (2) to make adequate use of the radar. The law judge found that the tow could not have been stopped within half the range of visibility at the time. Considering the full range of visibility, the law judge found that the tow "probably... could not have been stopped completely before reaching the dock." Appellant's claim that the tow would have "topped" or turned around in the river if he reduced speed was rejected by the law judge who found that this was not an "appreciable danger." The Commandant, on review, made essentially the same findings in affirming the suspension.

In his brief on appeal, appellant contends that the Commandant erred by (1) Not properly applying 33 U.S.C. 341 to the facts of this case; (2) including a conclusion of law with respect to immoderate speed in his findings of fact; (3) failing to find that a reduction in speed would have presented an appreciable danger; and (4) failing to find that the noise level of the radar might have interfered with navigation. Counsel for the Commandant has submitted a reply brief in opposition.

Upon consideration of the briefs of the parties and the entire record, the Board concludes that the law judge's findings of fact, as affirmed by the Commandant, are supported by substantial evidence of a probative and reliable character. We adopt those findings as our own and conclude therefrom that appellant's negligence was established. Moreover, we agree that, under the circumstances of this case, appellant's negligence warranted the

the record that the references to noise are confined to audible noise and do not relate to visual obscurement of targets.

⁴33 U.S.C. 341 provides, in pertinent part, that: "Every steam vessel shall, in fog, mist, falling snow, heavy rainstorms, or any other condition similarly restricting visibility, whether by day or night, go at a moderate speed."

sanction here imposed.

The moderate speed rule required the vessel and tow to proceed at speeds that would enable her to stop "in one-half the distance her lookout could see forward from the bow."⁵ There is some authority for a fullrange rule with respect to fixed objects such as an anchored vessel.⁶ Since appellant admitted that it would have been impossible to stop within his entire range of visibility, there can be no question that he was operating the vessel in violation of 33 U.S.C. 341. Thus, we have no reason to disturb the finding of the law judge in this regard. We attach no significance to the fact that the Commandant expressed appellant's failure to reduce speed to a moderate rate as a factual finding rather than a conclusion of law. To the extent that the finding involved a legal conclusion, it is hereby affirmed.

Appellant contends that a further reduction in speed would have endangered the vessel and tow due to the proximity of waterfront facilities downstream from the Borden docks. This contention concerns the possibility that reducing speed would have resulted in a loss of steerageway. According to the majority rule, inability to keep steerageway is not an excuse for exceeding moderate speed.⁷ Although there is some authority to the contrary,⁸ we believe that the more stringent rule should be applied in this administrative proceeding where safety, rather than compensation for damages, is our dominant concern.

The proximity of shore facilities in the smog area cannot serve to excuse appellant's violations of the moderate speed rule. He was required to slacken speed sufficiently to comply with the rule upon entering the smog,⁹ and had the continuous duty to

⁵Holland-America Line v. M/V Johns Stove, 286 F. Supp. 69, 72 (S.D. N.Y. 1968).

⁶J. Griffin, *The American Law of Collision* § 117.

⁷Anglo-Saxon Petroleum Co. v. United States, 224 F. 2d 86 (2d Cir. 1955); Barrios Bros. Inc. v. Lake Tankers Corp., 188 F. Supp. 300 (E.D. La 1960), and cases cited, aff'd per curiam 286 F. 2d 573 (5th Cir. 1961).

⁸Cities Service Co. v. M/S Melvin H. Baker, 384 F. 2d 911 (3d Cir. 1967).

⁹Villain & Fasio E. Compagnia v. Tank Steamer E. W. Sinclair, 207 F. Supp. 700 (S.D. N.Y. 1962), aff'd per curiam 313 F. 2d 722 (2d Cir. 1963), cert. denied 373 U.S. 948 (1963).

maintain a moderate speed during the ensuing 10-minute interval prior to the collision. Instead, appellant waited until entering the smog before he reduced engine speed to one-third ahead. He maintained that engine speed even though he was aware, or should have been, that it exceeded his vessel's capability to avoid the potential hazards in the smog. Under these circumstances, appellant cannot claim that he was suddenly confronted with an "appreciable" danger which continuously permitted violations of the moderate speed rule.

Appellant also argues that if he had reversed the engines to arrest headway, there was a possibility that the tow would have turned or "topped" around in the river. In our view, the risks attending excessive speed outweighed the mere possibility of a turning movement in the river under the circumstances prevailing at the time.

Finally, a vessel that fails to use her radar has the burden of establishing that this failure did not contribute to the collision.¹⁰ Appellant contends that the noise level of the radar interfered with his ability to navigate.¹¹ The record shows that the noise level, at most, was simply a nuisance or annoyance. The radar was operating when appellant assumed the watch and remained on for 10 minutes before he turned it off. He thereafter attempted to operate the radar again after entering the smog. These circumstances hardly support his argument that the noise level adversely affected his ability to navigate. On the contrary, we hold that the noise could not justify turning the radar off during reduced visibility, particularly since the radar would require 5 to 8 minutes to warm up.

In sum, the record shows that the towboat was proceeding at an immoderate speed in "zero" visibility and approaching a sharp bend in the river without navigational guidance. Appellant had sufficient time and should have taken corrective action before he advanced to the point where, as he conceded, an attempt to stop was futile. Appellant had an affirmative duty to reduce the speed of the tow further and he therefore did not exercise a degree of care commensurate with known risks.

¹⁰Afran Transport Co. v. The Bergechief, 274, 2d 469 (2d Cir. 1960); Villian & Fassio E. Compagnia v. Tank Steamer E. W. Sinclair, supra.

¹¹This is in reference to audible noise and does not concern any mechanical or electronic malfunction or the presentation of erroneous or misleading information on the radarscope.

ACCORDINGLY, IT IS ORDERED THAT:

1. The instant appeal be and it hereby is denied; and
2. The order of the Commandant affirming the suspension of appellant's license by the law be and it hereby is affirmed.

TODD, Chairman, BAILEY, Vice Chairman, McADAMS, and HOGUE, Members of the Board, concurred in the above opinion and order; HALEY, Member, did not participate.